No. 21139

United States
COURT OF APPEALS
For the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

BRIEF OF APPELLEE

On Appeal from the United States District Court for the District of Oregon

RIVES & RODGERS,
W. MICHAEL GILLETTE,
1400 Public Service Building,
Portland, Oregon 97204,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-66

INDEX

TABLE OF STATUTES

TABLE OF CASES

No. 21139

United States
COURT OF APPEALS
For the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

BRIEF OF APPELLEE

On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered in the United States District Court for the District of Oregon on May 8, 1966. The action was brought by appellee Margaret Hackelman against appellant Reliance National Life Insurance Company, asking $1,750 general damages and $10,000 punitive damages for fraud and deceit. Appellant denied any liability. Appellee is a resident of the State of Oregon. Appellant is a corporation organized and existing under the laws of the State of Utah. Jurisdiction is based upon 28 U.S.C. 1332(a)(1).

QUESTION PRESENTED

Was there evidence to support the findings of the trial court, sitting as a trier of fact, that:

1. There were false representations made by appellant's agent regarding "investment" by appellee, dividends to be received by appellee, and the purchase by appellee of a proprietary interest in appellant company.

2. Appellee was actually misled as to the nature of her purchases.

SUMMARY OF ARGUMENT

There is evidence that appellant's agent offered appellee an investment in appellant company. There is evidence that the negotiations between appellant's agent and appellee were couched throughout in terms of investment, not life insurance. There is evidence that the discussion of dividends was intimately connected with the discussion of "investments." There is evidence that appellee was misled into believing she was purchasing a proprietary interest in appellant company, and not buying life insurance. Since the findings of fact are supported by testimony, the trial judge had the right to accept the testimony as true and there is no basis for setting aside his findings as clearly erroneous.

ARGUMENT

1. There was evidence that appellee was defrauded by appellant.

The elements of actionable fraud have been defined in Oregon as follows:

(a) A representation,

(b) Its falsity,

(c) Its materiality,

(d) The speaker's knowledge of its falsity or ignorance of its truth,

(e) His intent that it should be acted on by the person and in the manner reasonably contemplated,

(f) The hearer's ignorance of its falsity,

(g) His reliance on its truth,

(h) His right to rely thereon,

(i) His consequent and proximate injury.

Conzelmann v. *Northwest Poultry & Dairy Products Co.,* 190 Or. 332, 350, 225 P.2d 757, 764 (1950). These elements have been recognized by this Court in *Equitable Life & Casualty Ins. Co.* v. *Lee,* 310 F.2d 262, 267 (9th Cir. 1962).

The burden of proof in civil actions is defined in ORS 17.250(5) as "a preponderance of the evidence." An action for fraud and deceit is a civil action. Several Oregon cases have proclaimed a higher burden of proof in fraud and similar actions, apparently on the theory that there is a presumption against wrongdoing and in favor of the fairness and reasonableness of transactions. This burden has been described as requiring "clear and satisfactory evidence." *Metropolitan Casualty Ins. Co.* v. *Lesher,* 152 Or. 161, 167, 52 P.2d 1133 (1935); *Conzel-*

mann v. *Northwest Poultry & Dairy Products Co., supra, at* 350, 225 P.2d at 765 ("clear, satisfactory and convincing"); accord, *Equitable Life & Casualty Ins. Co.* v. *Lee, supra,* at 267. This higher standard does not appear in the Oregon statutes, and the most recent statement of the Oregon Supreme Court suggests that the language of ORS 17.250(5) sets the correct standard. *Medak* v. *Hekimian,* 241 Or. 38, 46, 404 P.2d 203, 207 (1965) (holding an instruction that in cases involving fraud or estoppel the burden was "clear, convincing and satisfactory evidence" was error as to estoppel; not specifically discussed as to fraud).

There was evidence that Burchfield, appellant's agent, told appellee on the occasion of his first visit to her that he had an "investment" in which she might be interested (Tr. 7). Appellee testified that she was told "we would receive dividends . . . but there would be life insurance privileges" (Tr. 8). "[W]e were to get investments and this life insurance with it" (Tr. 9). Burchfield knew that this was an ordinary life insurance policy (Tr. 67-8), yet he told her it was an investment in his company:

> "Q. Did you tell her that she was investing money in your company?
>
> A. Yes" (Tr. 68).

He admitted that this was not an accurate picture of the proposed transaction:

> "Q. . . . And this was not an investment, was it?
>
> A. Not in the sense that you would invest in stocks or bonds or building, no. It was investing in a life insurance policy" (Tr. 68).

Not only were appellant's agent's statements misleading, but the title of these life insurance policies — "Estate Accumulator Contract" (Pl.'s Exs. 12, 13, 14)— were themselves misleading, as the trial judge found: ". . . [H]ere is language on the front of the policy that would indicate not that it was a life insurance policy, but that it was some type of an investment that she was about to enter . . . I think that the company policy, together with the way that the approach was made by the agent, does amount to a misreppresentation of what the policy really was" (Tr. 95).

From all this the trial court could have concluded that appellant's agent made material misrepresentations which induced appellee to purchase appellant's policies. Even promises of "dividends" (Tr. 8, 9) were part and parcel of the representations concerning "investments" in the agent's company, and the fact that appellee received one annuity (Tr. 42-43) does not vitiate the fact that appellee was induced to enter into an obligation to make periodic life insurance premium payments, which she did not desire to do.

These representations thoroughly misled appellee: "I thought they were investments all the time. That's the way they were represented to me" (Tr. 56). "Well, he never explained it any other [sic] than it was an investment" (Tr. 57). She believed she was purchasing single payment investments (Tr. 33). Her financial position was such that she could not afford to pay as much as $1500 every year on premiums (Tr. 31, 34). Without the statements and assurances of Burchfield, she would never have purchased the policies (Tr. 21).

In Oregon, even circumstantial evidence may be sufficient to prove fraud. *Mergenthaler Linotype Co.* v. *Evans,* 69 F.2d 287, 289 (9th Cir. 1934). In the instant case there was direct testimony from which the trial court could have found fraud. The judge had the benefit of observing the witnesses, a fact which he acknowledged aided him in resolving this case. "Gentlemen, I closely observed the plaintiff here, and I am convinced that she is telling it just the way it happened" (Tr. 94-5). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C. *Equitable Life & Casualty Ins. Co.* v. *Lee, supra,* at 268.

Even if these misrepresentations had been innocent, the proof was sufficient to give appellee the remedy of rescission, or a return to the *status quo ante,* which remedy is in effect what she received in this case. All that is required in such cases is proof of representations concerning a material fact, its falsity, and reliance. *Amort* v. *Tupper,* 204 Or. 279, 282 P.2d 660 (1955).

The trial court should be affirmed.

CONCLUSION

There was sufficient evidence to satisfy appellee's burden of proof with regard to fraud, whether that burden was the statutory requirement of "a preponderance of the evidence," or that stated in some of the cases as "clear and satisfactory evidence." The findings of the trial court, aided as they were by the opportunity to personally observe the witnesses, were not clearly erroneous, and should be affirmed.

Respectfully submitted,

RIVES & RODGERS
By: W. MICHAEL GILLETTE
Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. MICHAEL GILLETTE
Of Attorneys for Appellee